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In the Supreme Court of the United States

OCTOBER TERM, 1966

NO. 785

GEORGE H. BUTTERFIELD, SR.,

Petitioner,

v.

THE PLASTIC CONTACT LENS COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COLLINS MASON,
811 West Seventh Street,
Los Angeles, California 90017,
R. R. BULLIVANT,
DOUGLAS G. HOUSER,
527 Pacific Building,
Portland, Oregon 97204.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 11-66

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RECORD REFERENCES

References to "R" refer to the transcript of record in the case filed with this Court pursuant to Rule 21 of the Supreme Court Rules.

References to "App" refer to the Appendix to this Petition for Writ of Certiorari.

References to "F" and "C" refer to the Findings of Fact and Conclusions of Law, respectively, made by the trial court which are set forth in Appendix D to this Petition for Writ of Certiorari.

As a convenience to this Court, petitioner has added supporting documentation to the Record and Evidence to the Findings of Fact and Conclusions of Law entered by the trial court (R. 104-153) set forth in Appendix D hereto. References to exhibits offered by petitioner Butterfield will be "Ex" and a number designation (e.g., Ex. 1) while references to respondent Plastic's exhibits will be "Ex" and an alphabetical letter (e.g., Ex. RR), as this was the method of identification employed by the trial court. References to "Tr" refer to the trial court transcript.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, GEORGE H. BUTTERFIELD, SR., plaintiff-appellee below, respectfully prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review a judgment of

that Court, Appendix A to this petition (R. 342), entered August 31, 1966, reversing a judgment of the United States District Court for the District of Oregon, Appendix B (R. 154-163). The United States Court of Appeals for the Ninth Circuit denied plaintiff-appellee's below Petition for Rehearing by order dated October 6, 1966 (R. 344).

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, — F.2d — (9th Cir. 1966), 151 U.S.P.Q. 84, is set forth in Appendix C to this petition. The United States District Court for the District of Oregon did not write an opinion but the extensive Findings of Fact and Conclusions of Law made by that court (R. 104-153) are set forth in Appendix D hereto. The opinion of the United States District Court for the District of Oregon in prior relevant litigation between these parties is reported at *Solex Laboratories, Inc.* v. *Butterfield,* 202 F. Supp. 461 (D.Or. 1961) and is set forth in Appendix E.

JURISDICTION

Jurisdiction of this Court is based upon 28 U.S.C. 1254.

QUESTION PRESENTED

Should the rationale of *Automatic R. Mfg. Co.* v. *Hazeltine Research,* 339 U.S. 827 (1949) be extended to exempt from the protective bars of the federal anti-trust laws (15 U.S.C. 1, 2) clearly established trade restraint activities of a patent owner and his licensees against a competing patent owner and others, directly affecting over half an industry engaged in interstate commerce, by which activities the patent owner enforces its patent license agreements under a single patent to exact royalties on large quantities of unpatented materials used by the industry to manufacture competitive devices not covered by the licensed patent as well as on large quantities of non-infringing devices covered by a competitor's patent?

STATUTES INVOLVED

15 U.S.C. 1 provides in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890. c. 647, § 1,

26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282."

15 U.S.C. 2 provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282."

15 U.S.C. 15 provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731."

28 U.S.C. 52 (a) provides in pertinent part:

"* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

STATEMENT OF THE CASE

Petitioner instituted this action (R. 1-28) in the United States District Court for the District of Oregon. As more particularly pointed out hereinafter at pp. 8-9, the action is for violation of the federal antitrust laws involving a course of conduct by which respondent is enabled to enforce its patent license agreements to exact royalties on unpatented materials as well as on manufactured devices outside the monopoly of respondent's licensed patent, all in a manner which the trial court found substantially to restrict competition. The action was for an injunction and damages.

The cause was tried, with the result that detailed findings of fact and conclusions of law were entered by the trial judge in favor of petitioner on all of the issues on March 1, 1965 (R. 104-153, App. D, pages 35 to 99). Following the entry of findings of fact and conclusions of law a judgment (R. 154-163, App. B, pages 3 to 16) was entered granting petitioner the injunctive relief prayed for and retaining jurisdiction in the court to fix the amount of petitioner's damages at a subsequent stage of the proceeding.

An appeal was prosecuted by respondent from the injunction judgment so entered, The judgment of the appellate court reversed the judgment of the trial court (R. 342, App. A). Both in the trial court (R. 7) and in the appellate court petitioner urged that the conduct of respondent sought to be enjoined and for which damages were sought constituted violations of the federal antitrust laws, 15 U.S.C. 1 and 15 U.S.C. 2.

Jurisdiction of the trial court below was based upon 28 U.S.C. 1331, 1332, 2201-2202, and 15 U.S.C. 1, 2 and 15.

Petitioner is the owner of "Butterfield" United States Patent No. 2,544,246 (R. 105, F. 1, App. D, page 36), and respondent is owner of the "Tuohy" United States Patent No. 2,510,438 (R. 106, F. 6, App. D, page 37); those patents being for relatively different species of corneal contact lenses (R. 106-108, F. 7, 8, App. D, pages 38 to 41). The two competing patents involved in this litigation are the principal patents in the field of corneal contact lenses. All questions of patent validity and infringement between these parties were concluded by a consent judgment in prior litigation (R. 11-14, F. 22, App. D, pages 49 to 50).

The corneal contact lens industry in the United States comprises some 300 manufacturers (R. 126, F. 33, App. D, page 63). Respondent has license agreements under its "Tuohy" patent with between 160 and 165 or more than half of those manufacturers (R. 125-126, F. 31, App. D, pages 62 to 63), with whom respondent competes through its branches throughout the United States (R. 127, F. 36, App. D, page 64). Respondent is actively engaged as a manufacturer of corneal contact lenses and controls approximately 22 per cent of such business (Ex. 12, page 106).

Respondent's licensing practice requires its licensees to pay a royalty on all types of lenses, whether finished, unfinished, uncut, patented or unpatented (R. 125, F. 29, App. D, pages 61-62) (unfinished and uncut

lenses are unpatented materials used in fabricating complete lenses (R. 124-125, F. 28, App. D, page 61)). By said practice respondent collected $459,314.00 in royalties from April of 1962 when the prior patent litigation between the parties was settled up to June of 1964 when this case was tried below (R. 126, F. 32, App. D, page 63). Petitioner has license agreements with 35 of said manufacturers under his Butterfield patent (R. 126, F. 34, App. D, page 64). The parties compete with each other in the licensing of their respective patents (R. 129, F. 45, App. D, page 68). Respondent is a licensee under petitioner's Butterfield patent having purchased a license from petitioner for $50,000.00 in 1960 (R. 111, F. 14, App. D, page 44). Corneal contact lenses constitute a substantial part of interstate commerce (R. 127-128, F. 40, App. D, page 66).

Insofar as is material to the consideration of this petition, the facts of record are as follows:

In the manufacture of corneal contact lenses under the respective patents of the parties, as well as under other patents, said manufacturers employ unpatented pieces of plastic material known as "uncut and unfinished" items. Said items are pieces of lens material partially manufactured by the manufacturers and carried in stock for future use in lens manufacture, or are sold to lens fitters to be fabricated into lenses of any desired patent. Such unpatented pieces of lens material constitute a substantial part of the commerce between the several states of the United States (R. 124-125, F. 28, App. D, page 61).

Prior to April, 1962, petitioner and respondent were parties to a patent infringement and unfair competition action before the same District Judge that heard the present action. The prior action was concluded in April, 1962, by a Settlement Agreement (R. 15-28, F. 23, 24, App. D, pages 51 to 54) and Consent Judgment (R. 11-14, F. 22, App. D, pages 48 to 50) holding, inter alia, that the Butterfield and the Tuohy patents were valid and that petitioner did not infringe respondent's Tuohy patent.

Part of respondent's accused conduct involved in the prior action, as here, consisted of its misrepresentations to the trade that the Tuohy patent was of a scope covering the lens of petitioner's patent, and that petitioner's patent was inoperative and without utility, for which respondent was under preliminary restraint at the time of the conclusion of the former action. See *Solex Laboratories, Inc.* v. *Butterfield,* 202 F. Supp. 461 (D. Or. 1961) set forth at Appendix E hereto, pages 101 to 107. In both the prior litigation and the trial court below respondent was found to be guilty of continuing many of the improper acts of its predecessor Solex Laboratories, Inc. in its licensing program of the Tuohy patent prior to respondent's purchase of such patent from Solex (R. 110-112, F. 13, 15 and 16, App. D, pages 43 to 45). See *Solex Laboratories, Inc.* v. *Plastic Contact Lens Co.,* 268 F.2d 637 (7th Cir. 1959).

After the Consent Judgment in said former action, respondent's licensees, upon learning of the Consent Judgment, ceased or threatened to cease paying royal-

ties to respondent upon lenses made in accordance with petitioner's Butterfield patent (R. 141, F. 56(a), App. D, page 85). To counteract that cessation of royalty payments, respondent commenced enforcing an interpretation of its license agreements requiring its licensees to pay to respondent royalties on said unpatented materials used in the fabrication of lenses made under petitioner's patent or any other patent. By virtue of that accused practice, respondent was able to exact from its licensees royalties not only on the unpatented materials but also on all finished, fabricated lenses made by its licensed manufacturers regardless of whether said lenses are fabricated in accordance with respondent's patent or any other patent (R. 125, F. 29, App. D, page 62).

To enable it to enforce such an interpretation of its patent license agreements, following said settlement and Consent Judgment in the said former action, respondent engaged in a course of aggravated conduct including coercive suits against its licensees (R. 133-139, F. 50-52, App. D, pages 73 to 82); indemnifying its licensees against infringement of petitioner's patent without limiting the indemnification to infringement claims arising out of the licensees' manufacture of lenses in accordance with respondent's Tuohy patent (R. 144, F. 56, App. D, pages 85 to 88); misrepresentations to the trade as to the terms of the settlement agreement and consent judgment (R. 129, F. 46, App. D, pages 69 to 71 and R. 139-140, F. 54, App. D, page 83); and continuing to misrepresent that its Tuohy patent was of a scope covering petitioner's Butterfield lens (R. 139, F. 53, App. D, pages 82 to 83).

Undisputed evidence of trade witnesses established that the price situation existing in the corneal contact lense industry is such that a manufacturer cannot afford to pay petitioner a royalty under its patent on lenses made in accordance therewith, and also to pay another royalty to respondent on the unpatented materials used in fabricating the lens (R. 127-128, F. 39 and 41, App. D, pages 65 to 66); with the end result that respondent's licensees who also make petitioner's lens, resorted to respondent's indemnification agreement instead of accepting license rights from petitioner (R. 140, F. 55, App. D, pages 83 to 85). At the time of trial the uncontradicted evidence showed that the manufacture and sale of contact lenses is highly competitive with a constant downward price trend with prevailing prices at time of trial being approximately $3.00 per uncut lens and $3.75 per finished lens (R. 127, F. 37, App. D, page 65). The prevailing license rate under respondent's licensing system is 50 cents per lens or per unpatented piece of lens material and the prevailing rate per lens under petitioner's license system is slightly less than that amount (R. 127, F. 38, App. D, page 65). The ordinary manufacturer cannot afford to pay double royalties of approximately $1.00, i.e. almost one-third of the sale price of the lens, without serious economic distress (R. 127, F. 39, App. D, page 65).

Respondent's accused royalty practice also provided it with a competitive advantage over its own licensees inasmuch as respondent does not incur any royalty on the unpatented materials.

Respondent has contended that petitioner has employed a royalty base similar to that of respondent. This assertion is simply not true as evidenced by the findings of the trial court (R. 144, F. 57(c), App. D, page 89 and R. 149, F. 68, 71 and 72, App. D, pages 94 to 95), and as fully set forth in the petition for rehearing (page 3), and petitioner's answering brief (pages 77-79), both in the court of appeals, and both of which petitioner has requested to be certified and lodged with the Clerk of this Court, in addition to the record certified from the Court below.

The trial court below rendered judgment for petitioner against respondent based on findings and conclusions (R. 104-153, App. D, pages 35 to 99) supported by substantial oral and documentary evidence, which included findings that respondent's conduct was in bad faith and effected substantial restraint of competition as well as serious damage to petitioner.

The Court of Appeals below (see Opinion set forth in App. C, pages 17 to 33), in reversing the judgment of the District Court, rejected those findings contrary to the Federal Rules of Civil Procedure, 28 U.S.C. 52 (a), and held that respondent's conduct of exacting royalties under its Tuohy patent on unpatented materials was sanctioned by this Court's opinion in *Automatic R. Mfg. Co.* v. *Hazeltine Research*, supra, despite the fact that respondent had not made any evidentiary showing which could bring the facts of the case within the rationale of said decision by this Court.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals below appears to have decided an important new question of federal law contrary to any rationale which logically can be attributed to the prior decisions of this Court interpreting the federal antitrust law. If allowed to stand, the decision of said court below will constitute a dangerous precedent to other courts in their interpretations of this Court's prior decisions in "patent misuse" and "tie-in" cases and in their application of the doctrine to facts involving attempts by patentees to expand their patents beyond the metes and bounds of the patent grant. More particularly, the court below has interpreted the rationale of this Court's decision in the *Automatic* case as sanctioning the accused activity of respondent in exacting royalties, under a single licensed patent, on unpatented materials used in the manufacture of devices competitive with the licensed patented devices as well as on manufactured devices not covered by the licensed patent, without any showing of any compelling reason for such activities.

As appears from the above statement, several of the reasons set forth in Supreme Court Rule 19 exist for this Court's granting review on writ of certiorari:

I. The Court of Appeals, in approving respondent's royalty base, has decided an important question of federal law in conflict with other opinions of this Court, or

II. If other opinions of this Court have not al-

ready established the invalidity of respondent's royalty base, then the invalidity of respondent's royalty base is an important question of federal law which has not been, but should be, settled by this Court; and

III. The Court of Appeals in failing to honor F.R.C.P. 52(a) by ignoring the well founded findings of fact made by the trial judge, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

These reasons, in their application to this case, may be amplified as follows:

1. The Appellate Court opinion (App. C, pages 17 to 33) erroneously misconstrues and applies the decision of this Court in *Automatic*, supra, to validate the admitted conduct of respondent in enforcing its all-inclusive patent royalty base as covering large numbers of unpatented devices and devices falling under the claims of competing patents (R. 125, F. 29, App. D, pages 61 to 62).

2. The Appellate Court erroneously failed to apply the doctrines condemning conspiracies to restrain trade and to monopolize trade recognized in many patent misuse cases decided in this court, such as *Mercoid Corp.* v. *Mid-Continent Invest. Co.*, 320 U.S. 661 (1943), *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U.S. 502 (1916) and *Morton Salt Co.* v. *G. S. Suppiger*, 314 U.S. 488 (1941), as requiring a conclusion that the federal antitrust laws have been violated by respondent's enforced royalty base, when considered

alone or in connection with the associated acts of misconduct found by the trial court.

3. Substantial and novel questions of public importance are involved because neither the decision in *Automatic*, supra, cited in (1) above, nor the decisions in the cases from this court involving patent misuse, cited in (2) above, necessarily determine the question as to whether or not a patent license royalty base including both unpatented articles and those covered by competing patents in the same field, made effective through a system of license contracts and indemnity agreements with numerous licensees, engaged in interstate commerce, violate the antitrust laws. The Appellate Court opinion thus sought to be reviewed by this petition creates widespread uncertainty as to the proper application of the antitrust laws in the field of patent license royalty practice and contracts.

Reasons I and II for granting the writ, as expressed above, both involve a determination of the scope and effect of the *Automatic R. Mfg. Co.* v. *Hazeltine Research*, 339 U.S. 827 (1949), sometimes referred to herein as "*Automatic.*" Petitioner contends that, to the extent *Automatic*, supra, allowed the collection of royalties on unpatented items, it was a narrow exception to the rule prohibiting an unlawful extension of a patent over unpatented items and may not serve as support for the validity of respondent's royalty base as *Automatic* is clearly distinguishable on its facts and legal principles from the instant case for the reasons set forth below:

First, that case involved a license agreement covering seven hundred and seventy (770) (not just one as here) patents and applications of the licensor, all or part of which were likely to be used in the business of the licensee. Obviously, it was an extreme case where difficulties of accounting were said to justify a royalty based on a percentage of licensee's sales. Even there, the license was based on a percentage of sales of fully manufactured devices rather than being directly tied to each unfinished and unpatented sales unit.

Second, there was no showing in the *Automatic* case that sales of the licensee included items falling under the teachings of patents held by others, competing with the licensor, as is true in the case at bar, where many of respondent's licensees were making and selling Butterfield-type lenses and declining to deal with petitioner because of their unwillingness or inability to pay a double royalty (R. 128, F. 41, App. D, page 66).

Third, there were no findings of fact, as there are here, that the licensor was guilty of other contemporaneous trade restraint activities set forth in the "Statement of the Case," see p. 9, in combination with the challenged royalty base, all directed against a competitor, with both the wrongful intent and effect of discouraging and preventing the licensee from doing business with the competitor, even though such licensee infringed the competitor's patent. This Court, in *Automatic*, supra, clearly inferred that, if other wrongful acts, such as those present in the case at bar, had accompanied the method of measuring royalties involved in the license approved

in *Automatic,* supra, such license would have been illegal as a misuse of patents, for at p. 834 of this Court's opinion in *Automatic,* supra, this Court specifically limited its holding by stating:

> "* * * *We hold* that in licensing the use of patents to one engaged in a related enterprise, *it is not per se* a misuse of patents to measure the consideration by a percentage of the licensees sales." (Emphasis supplied)

Fourth, the attack in *Automatic,* supra, was by a licensee, under the challenged royalty agreement, in an action by the licensor to collect royalties. The case did not, as does the case at bar, involve an attack by a competitor of the licensor asserting that the royalty base, under all the facts, illegally restrained trade, to the detriment of the competitor and the public. The Court, therefore, was not faced with any real challenge that the royalty provision restrained trade illegally as against a competitor, or even, that it tended to create a monopoly to the detriment of a competitor.

In *Automatic,* supra, at pp. 832-833, the Court stated that an extenuating circumstance was that the license did not place any restraint upon competition. Here, while respondent's contract does not expressly place any restraint upon competition, respondent uses it to exact from its licensees a royalty on all lenses, even if made under the Butterfield patent, and even on unpatented materials necessarily used in the manufacture of competing lenses (R. 125, F. 29, App. D, pages 61 to 62). That, therefore, has the direct effect of placing a restraint upon competition because, as the evidence shows,

the market conditions are such that a manufacturer cannot pay one royalty on the unpatented materials and another royalty on the finished lenses, or double royalty (R. 127-128, F. 39 and 41, App. D, pages 65 to 66).

The facts of the instant case are not identical with those involved in the patent license "tie-in cases" such as *Mercoid Corp.* v. *Mid-Continent. Invest. Co.,* 320 U.S. 661 (1943) or in the patent license price fixing cases such as *United States* v. *Univis Lens Co.,* 316 U.S. 241 (1941), or in the patent license cases involving contracts not to use competing devices falling beyond the scope of the licensed patent, such as *McCullough* v. *Kammerer Corporation,* 166 F.2d 759 (9th Cir. 1948) and *National Lockwasher Co.* v. *Garrett Co.,* 137 F.2d 255 (3rd Cir. 1943). However, the reasoning of those decisions condemns as violative of the antitrust laws any attempt by a patentee to extend his patent monopoly so as to suppress competition or acquire monopoly outside the area of the patent itself, and they further condemn any particular form or method by which the monopoly is sought to be improperly extended. The underlying philosophy of such cases, reasonably extended to the facts of this case, should logically invalidate the challenged royalty base here, which covers large quantities of unpatented articles and articles falling under the teachings of an admittedly valid competing patent (R. 115, F. 22, App. D, page 50).

Also see *Hazeltine Research, Inc.* v. *Zenith Radio Corporation,* 239 F. Supp. 51, 77-78 (N.D. Ill., E.D., 1965) as illustrative of the illegality of an attempt to

extend a patent monopoly to collect royalties on goods not within the teachings of the patent. The court therein found violations of the antitrust laws under factual circumstances analagous to those of the instant case and the briefs of counsel therein make it clear that such court refused to extend *Automatic R. Mfg. Co.* v. *Hazeltine Research,* 339 U.S. 827 (1949) beyond the narrow limits of such opinion. And see *United States v. Loew's Inc.,* 371 U.S. 38, 46-47 (1962), a copyright tie-in case, where this court, after citing *Mercoid,* supra, and other "tie-in" cases, explained the philosophy of such cases and their application to antitrust law as follows:

> "These cases reflect a hostility to use of the statutorily granted patent monopoly to extend the patentee's economic control to unpatented products. The patentee is protected as to his invention, but may not use his patent rights to exact tribute for other articles.
>
> "Since one of the objectives of the patent laws is to reward uniqueness, the principle of these cases was carried over into antitrust law on the theory that the existence of a valid patent on the tying product, without more, establishes a distinctiveness sufficient to conclude that any tying arrangement involving the patented product would have anti-competitive consequences."

It is difficult to reconcile the Appellate Court's application of *Automatic,* supra, to facts which seem to require a conclusion of antitrust violation, particularly when these facts involve a combination of the challenged royalty practice with other contemporaneous trade restrait activities.

Nevertheless, the Court of Appeals below construed the rationale of *Automatic,* supra, to sanction respondent's accused conduct described in the "Question Presented," which petitioner submits to be erroneous.

It is submitted that a more accurate description of the rationale of *Automatic,* supra, is that it only sanctions an exception to the federal antitrust laws under the peculiar and extraordinary facts and circumstances of that action. If the rationale of that case is otherwise, it would be difficult to reconcile it with this Court's decision in *B. B. Chemical Co.* v. *Ellis,* 314 U.S. 495, 498 (1942) wherein this Court said:

> "The patent monopoly is not enlarged by reason of the fact that it would be more convenient to the patentee to have it so or because he cannot avail himself of its benefits within the limits of the grant."

The court of appeals' decision in this case is not only in conflict with *B. B. Chemical* v. *Ellis,* supra, but is also in conflict with this Court's opinions in *Automatic,* supra, when properly applied, and the philosophy of the "tie-in" cases such as *Mercoid Corp.* v. *Mid-Continent. Invest. Co.,* 320 U.S. 661 (1943) which were distinguished in *Automatic,* supra, at p. 834 but *not* overruled; and related types of cases, such as *Carbice Corp.* v. *American Patents Develop. Corp.,* 283 U.S. 27 (1930), and *Leitch Mfg. Co.* v. *Barber Co.,* 302 U.S. 458 (1938) which stand for the proposition that no matter how convenient or desirable it might be to do so, in the licensing of a patent, the patent owner must not extend

or overstep the lawful bounds of his patent monopoly by tying his royalty base to the payment of royalties on unpatented, staple articles of commerce. The reasons given by this Court for distinguishing the cases relied upon by petitioner in *Automatic,* supra, are not present in this case and the appellate court's opinion is in conflict with such authorities.

The language used by Justice Douglas in his dissent with the concurrence of Justice Black, in *Automatic* at p. 838-839 is applicable to respondent's royalty base which exacts tribute in the form of royalties on all lenses, whether within the teachings of its patent or not. Justices Douglas and Black said:

> "The patent owner has used the patents to bludgeon his way into a partnership with those licensees, collecting royalties on unpatented as well as patented materials."
>
> "A plainer extension of a patent by unlawful means would be hard to imagine."
>
> * * * * *
>
> "* * * But what worse enlargement of monopoly is there than the attachment of a patent to an unpatentable article? When we consider the constitutional standard, what greater public harm than that is there in the patent system?

If *Automatic,* supra, and other opinions of this Court do not already make respondent's royalty base invalid, petitioner submits that the paramount public interest in patent monopolies renders it extremely important and timely that this Honorable Court clearly and definitely define the limits of the rationale of the

Automatic, supra, case lest the decision below will afford patent owners an excuse for unlawfully expanding patents beyond the legitimate monopolies for which they were granted, despite the restrictive effect of such conduct upon competition.

Petitioner submits that much of the claimed error of the Appellate Court below arose out of the latter court's failure to interpret the rationale of the *Automatic* case in the light of the ignored, amply supported, findings of fact of the trial court as to the substantial adverse effect of respondent's conduct on competition, and in the light of the trial judge's opportunity, in a prolonged course of litigation, to appraise the wrongful motives and intents of respondent.

CONCLUSION

Petitioner, for the reasons stated above, requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

COLLINS MASON
R. R. BULLIVANT
DOUGLAS G. HOUSER
Attorneys for Petitioner

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